

1 ROB BONTA
Attorney General of California
2 LARA HADDAD, State Bar No. 319630
Supervising Deputy Attorney General
3 JENNIFER E. ROSENBERG, State Bar No. 275496
SHIWON CHOE, State Bar No. 320041
4 CHRISTOPHER J. KISSEL, State Bar No. 333937
Deputy Attorneys General
5 300 South Spring Street, Suite 1702
Los Angeles, CA 90013-1230
6 Telephone: (213) 269-6388
E-mail: Christopher.Kissel@doj.ca.gov
7 *Attorneys for Defendant Rob Bonta, in his official
capacity as Attorney General of California*
8

9 IN THE UNITED STATES DISTRICT COURT
10 FOR THE NORTHERN DISTRICT OF CALIFORNIA
11 SAN JOSE DIVISION
12

13 **NETCHOICE, LLC,**

14 Plaintiff,

15 v.
16

17 **ROB BONTA, in his official capacity as
Attorney General of California,**

18 Defendant.
19
20
21
22
23
24
25
26
27
28

No. 5:24-cv-07885-EJD

**DEFENDANT'S SUPPLEMENTAL
BRIEF IN OPPOSITION TO
PLAINTIFF'S MOTION FOR A
PRELIMINARY INJUNCTION**

Date: December 17, 2024
Time: 9:00 a.m.
Courtroom: 4 (Fifth Floor)
Judge: The Honorable Edward J. Davila
Trial Date: None set.
Action Filed: November 12, 2024

INTRODUCTION

On December 6, 2024, the Court ordered the parties to submit supplemental briefing on whether Plaintiff has associational standing on behalf of its members to raise an as-applied challenge to the Act. It does not. Plaintiff, an internet trade association, brings an as-applied challenge that is rooted in factual circumstances specific to five of its members. But Plaintiff itself argues that those members have significantly different features and functions, which the Act may affect in significantly different ways. Plaintiff's as-applied challenge therefore is not subject to proof in a group context; instead, it requires the participation of individual members in the suit, which precludes associational standing. Because Plaintiff lacks associational standing to bring an as-applied challenge, it is unlikely to succeed on the merits of that challenge.

PLAINTIFF LACKS ASSOCIATIONAL STANDING TO BRING ITS AS-APPLIED CHALLENGE

"At the preliminary injunction stage, the [P]laintiff[] 'must make a clear showing of each element of standing[.]'" *LA All. for Hum. Rts. v. County of Los Angeles*, 14 F.4th 947, 956 (9th Cir. 2021) (quoting *Yazzie v. Hobbs*, 977 F.3d 964, 966 (9th Cir. 2020) (per curiam)). To determine whether a plaintiff has standing, the Court considers the Complaint and all other evidence the plaintiff has submitted in support of its motion. *Id.* at 957 (quoting *City & County of San Francisco v. U.S. Citizenship & Immigr. Servs.*, 944 F.3d 773, 787 (9th Cir. 2019)).

"While 'a facial challenge is a challenge to an entire legislative enactment or provision,' an as-applied challenge is a challenge to 'the application of the statute to a specific factual circumstance.'" *Holt v. Facebook, Inc.*, 240 F. Supp. 3d 1021, 1034 (N.D. Cal. 2017) (quoting *Hoye v. City of Oakland*, 653 F.3d 835, 857 (9th Cir. 2011)). Plaintiff claims to bring an as-applied challenge to the Act on behalf of five of its members: "(1) Google, which owns and operates YouTube; (2) Meta, which owns and operates Facebook and Instagram; (3) Nextdoor; (4) Pinterest; and (5) X." Complaint at ¶ 15.

An organization has associational standing to sue on behalf of its members when: (1) its members would have standing in their own right; (2) the interests it seeks to protect are germane to its purpose; and (3) neither the claim asserted, nor relief requested, requires the participation of

1 individual members in the lawsuit. *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 343
2 (1977). The third prong has been classified as “prudential,” but that does not “rob it of its value.”
3 *United Food and Com. Workers Union Loc. 751 v. Brown Group*, 517 U.S. 544, 556 (1996).
4 Plaintiff argues that it has associational standing because “(1) some NetChoice members would
5 have individual standing to sue in their own right; (2) challenging the Act is germane to
6 NetChoice’s purpose; and (3) members’ individual participation is unnecessary in this purely
7 legal challenge.” Complaint at ¶ 14.

8 **I. ASSOCIATION OF CHRISTIAN SCHOOLS V. STEARNS COUNSELS AGAINST PLAINTIFF’S**
9 **ASSOCIATIONAL STANDING TO BRING AN AS-APPLIED CHALLENGE**

10 Plaintiff’s claim of associational standing to bring its as-applied challenge fails because the
11 proof required to establish it cannot be offered in a “group context.” *Hunt*, 432 U.S. at 344. The
12 district court’s decision in *Association of Christian Schools v. Stearns*—which was affirmed by
13 the Ninth Circuit—demonstrates the problems with Plaintiff’s particular as-applied claims. In
14 *Stearns*, the plaintiff was a consortium of religious high schools. *Ass’n of Christian Sch. Int’l v.*
15 *Stearns*, 678 F. Supp. 2d 980, 983 (C.D. Cal. 2008), *aff’d*, 362 F. App’x 640 (9th Cir. 2010). It
16 brought an as-applied First Amendment challenge to the University of California’s refusal to
17 consider, as part of the admissions process, students’ performance in 36 classes offered at the
18 consortium’s member schools. *Id.*

19 The district court rejected the plaintiff’s claim of associational standing on two grounds
20 particularly relevant to the as-applied challenge here. *Id.* at 984–86. First, the court explained that
21 there can be no associational standing when a plaintiff organization brings claims that “are not
22 common to the entire membership, nor shared by all in equal degree.” *Stearns*, 678 F. Supp. 2d at
23 983 (quoting *Warth v. Seldin*, 422 U.S. 490, 515 (1975)). The University of California’s decisions
24 to deny 36 specific classes were necessarily not “common to the entire membership.” *Id.* So too
25 here. Plaintiff’s challenge is limited to five of its members, excluding many members such as
26 Airbnb, Netflix, StubHub, Lyft, and others. *See Cleland Decl.* ¶ 4. Plaintiff thus does not even
27 attempt to allege that its claims are “common to the entire membership.”

28 Second, the district court explained that there can be no associational standing when a

1 plaintiff organization brings claims that “require an ‘ad hoc factual inquiry’ for each member
2 represented by the association.” *Stearns*, 678 F. Supp. 2d at 986 (quoting *Rent Stabilization Ass’n*
3 *of City of N.Y. v. Dinkins*, 5 F.3d 591, 596 (2d Cir. 1993)). That conclusion foreclosed the
4 plaintiff’s associational standing because each of the 36 denials at issue required an “ad hoc
5 inquiry” to assess their constitutionality. *See id.* And it forecloses Plaintiff’s associational
6 standing here as well. Plaintiff has based its as-applied claim on the Act’s alleged future effects
7 on just five of its members and it has failed to show that those five will be affected in the same
8 way. For example, it offers opinions from two declarants about how they believe Meta and
9 Google will be affected by the Act. But those declarations only demonstrate how different those
10 platforms are, and how different the as-applied constitutional inquiry must be from platform to
11 platform. *See, e.g.*, Davis Decl. ¶ 60 (discussing potential effect on Facebook’s “marked safe”
12 alerts); Veitch Decl. ¶ 45 (discussing potential effect on YouTube’s ability to “let [users] know
13 when there are new videos and updates from [their] favorite channels”).

14 Moreover, very little is known about how members’ respective content-recommendation
15 algorithms work, *see* Egelman Decl. ¶ 32—there is nothing in the record to illuminate that
16 process, or to show, for instance, how they differ from platform to platform. Opp. at 10–12. But
17 inquiry into that question must proceed on a platform-by-platform basis because it bears on
18 matters as fundamental as what effect the Act may have on each platform and what level of First
19 Amendment protection those mechanisms should receive, if any. *See, e.g., Moody v. NetChoice,*
20 *LLC*, 144 S. Ct. 2383, 2436 (2024) (Alito, J., concurring in the judgment) (“[A]t this stage and on
21 this record, we have no way of confirming whether all of the regulated platforms use algorithms
22 to organize all of their content, much less whether these algorithms are expressive.”). The same is
23 true, for example, of the notifications those platforms send. Plaintiff offers evidence that each of
24 the five members send notifications. Cleland Decl. ¶ 9. But there are more questions to be
25 answered—including whether any, or all, of those platforms send notifications to minors, and if
26 so, what material those notifications contain.

27 And as to Nextdoor, Pinterest, and X, Plaintiff offers nothing beyond the acknowledgement
28 that they send some type of notifications, Cleland Decl. ¶ 9, plus a single sentence each about

1 how the platforms are used, *e.g.*, *id.* at ¶ 6 (“On Pinterest, users can discover ideas for recipes,
2 style, home decor, motivation, and more.”). In short, many “ad hoc factual inquiries” will be
3 necessary to determine whether any as-applied relief is warranted, a fact that precludes Plaintiff
4 from establishing associational standing to assert its as-applied claims.

5 The *Stearns* court rejected the plaintiff’s claim of associational standing on a third ground
6 as well—one that underscores another, different problem with Plaintiff’s as-applied challenge.
7 The consortium had argued that it had associational standing because it brought a claim for
8 declaratory relief. *Stearns*, 678 F. Supp. 2d at 985. The court explained that the declaratory relief
9 it sought—approval by the university of its members’ 36 classes—was “individualized” and thus
10 could not be resolved in a “group context.” *Id.* Here, by contrast, Plaintiff’s sought-after relief
11 reveals that its challenge is really a facial one: the relief it seeks is not individualized but rather
12 completely *generalized*. *See, e.g.*, Complaint at p. 31 (seeking declaration “that California Senate
13 Bill 976 is unlawful”); *id.* at p. 32 (seeking declaration that “§§ 27000.5(b), 27001, 27002, 27005,
14 and 27006(b)-(c) violate the First Amendment to the Constitution”). That Plaintiff seeks
15 generalized relief, rather than anything addressed specifically to the five members on whose
16 behalf it brings its as-applied challenge, belies the idea that there is any as-applied challenge at
17 all. A complaint that seeks relief “reach[ing] beyond the particular circumstances of these
18 plaintiffs” must be analyzed as a facial challenge, not an as-applied challenge. *John Doe No. 1 v.*
19 *Reed*, 561 U.S. 186, 194 (2010).

20 The Ninth Circuit’s affirmance in *Stearns* likewise supports the conclusion that Plaintiff
21 lacks associational standing. The court emphasized that “[t]he plaintiffs’ as-applied claims and
22 the relief they seek, although equitable in nature, both require ‘individualized proof’ specific to
23 each rejected course and the school that offered it.” *Ass’n of Christian Sch. Int’l v. Stearns*, 362 F.
24 App’x 640, 644 (9th Cir. 2010). The same is true here. Among the five members on whose behalf
25 Plaintiff brings its as-applied challenge, material, member-specific questions preclude disposition
26 in a group context. *Hunt*, 432 U.S. at 344. Because those “ad hoc factual inquiries” are necessary
27 to determine whether as-applied relief is warranted in this case, they preclude Plaintiff from
28 asserting associational standing concerning its as-applied claims.

1 **II. OTHER CASES ACCORD WITH THE CONCLUSION THAT PLAINTIFF CANNOT**
2 **DEMONSTRATE ASSOCIATIONAL STANDING FOR ITS AS-APPLIED CHALLENGE**

3 The Ninth Circuit and other federal courts have continually rejected associational standing
4 concerning similar as-applied claims. For example, the Ninth Circuit has rejected a claim of
5 associational standing by an organization of ERISA claimants asserting the wrongful withholding
6 of certain payments. *Spinedex Physical Therapy v. United Healthcare of Ariz.*, 770 F.3d 1282,
7 1287 (9th Cir. 2014). The court explained that “an association has standing only to seek relief that
8 would not require the participation of its individual members,” and the variegated circumstances
9 surrounding the withheld payments required each claimant’s participation. *Id.* at 1292–93. In the
10 First Amendment speech context, the Third Circuit has concluded there was no associational
11 standing for adult film trade associations challenging a law requiring age and identity verification
12 of performers. *Free Speech Coal., Inc. v. Att’y Gen. U.S.*, 974 F.3d 408, 413–14 (3d Cir. 2020).
13 The claims were based on the law’s “application to a particular person under particular
14 circumstances” and thus “require[d] an individualized inquiry for each association member.” *Id.*
15 And the Fifth Circuit examined a Free Exercise claim requiring the plaintiff to show how the law
16 “operate[d] against him,” rather than rely on arguments about the enactment’s scope. *Cornerstone*
17 *Christian Sch. v. Univ. Interscholastic League*, 563 F.3d 127, 134 (5th Cir. 2009) (quoting *Harris*
18 *v. McRae*, 448 U.S. 297, 321 (1980)). The involvement of members who suffered that “coercive
19 effect” was essential to the case, precluding associational standing. *Id.* at 134–35.

20 **III. THE CASES PLAINTIFF CITES DO NOT SUPPORT AN ALTERNATE CONCLUSION**

21 Plaintiff cites five district court cases to support its allegation of associational standing.
22 Complaint at ¶ 14. Four of those cases are inapposite because they did not involve an as-applied
23 challenge. *NetChoice, LLC v. Reyes*, No. CV 23-00911-RJS-CMR, 2024 WL 4135626, at *8 (D.
24 Utah Sept. 10, 2024); Complaint at ¶ 58, *NetChoice, LLC v. Fitch*, No. CV 24-170-HSO-BWR,
25 2024 WL 3276409 (S.D. Miss. July 1, 2024), ECF No. 1; Complaint at ¶ 11, *NetChoice, LLC v.*
26 *Yost*, 716 F. Supp. 3d 539 (S.D. Ohio 2024), ECF No. 1; *see generally* Complaint, *NetChoice,*
27 *LLC v. Griffin*, No. CV 23-05105, 2023 WL 5660155 (W.D. Ark. Aug. 31, 2023), ECF No. 2.

28 The fifth case only helps to show why Plaintiff’s as-applied associational standing

1 argument fails. There, the district court concluded that Plaintiff had associational standing to
2 bring an as-applied challenge to a statute. *Comput. & Commc'ns Indus. Ass'n v. Paxton*, No. CV
3 24-849-RP, 2024 WL 4051786, at *9 (W.D. Tex. Aug. 30, 2024). But the court did so because the
4 statute “impose[d] relatively uniform requirements on all [p]laintiffs’ covered members.” *Id.* The
5 court did not cite authority to support that conclusion. In fact, it seemed to rely on its detailed
6 analysis, in the paragraphs above, relating to plaintiffs’ *facial* challenge, where it explained that
7 the predominantly legal nature of plaintiffs’ case meant individual participation by plaintiffs’
8 members was not required. *Id.* at *8–9. That erroneous conclusion—that associational standing
9 exists in facial *and* as-applied contexts when a plaintiff’s case is fundamentally legal rather than
10 factual—seems to inform Plaintiff’s allegation here that its members need not participate
11 individually because its case is a “purely legal challenge.” Complaint at ¶ 14.

12 In contrast, Plaintiff’s as-applied challenge here is not “purely legal.” It is based on
13 “specific factual circumstance[s]” *Hoye*, 653 F.3d at 857—namely, the effect of the Act’s actual
14 enforcement on a few of Plaintiff’s individual members. That distinguishes Plaintiff’s challenge
15 from the facial challenges at issue in cases like *Virginia v. American Booksellers Association*,
16 which hinged on the scope of a law rather than its specific applications to particular individuals.
17 484 U.S. 383, 388, 396 (1988). Indeed, it is because of the sweeping scope of available relief in
18 facial cases that the Supreme Court has made them so “hard to win,” requiring plaintiffs to show
19 a substantial imbalance between a statute’s constitutional and unconstitutional applications.
20 *Moody*, 144 S. Ct. at 2397; *Opp.* at 7–8.

21 Plaintiff’s as-applied challenge on behalf of five members presents a different obstacle. Its
22 evidence underscores the distinctiveness of the platforms operated by two of its members, Meta
23 and Google; as to the other three, Plaintiff offers hardly any evidence at all. *See supra* at 3–4.
24 Both issues highlight the “individualized proof” required to succeed on Plaintiff’s as-applied
25 claim, precluding associational standing as to that claim. *Stearns*, 362 F. App’x at 644.

26 CONCLUSION

27 Plaintiff is unlikely to succeed on the merits of any as-applied challenge because it lacks
28 associational standing to assert such a challenge.

1 Dated: December 11, 2024

Respectfully submitted,

2
3 ROB BONTA
Attorney General of California
4 LARA HADDAD
Supervising Deputy Attorney General
5 JENNIFER E. ROSENBERG
SHIWON CHOE
6 Deputy Attorneys General

7
8 /s/ Christopher J. Kissel
CHRISTOPHER J. KISSEL
9 Deputy Attorney General
Attorneys for Defendant Rob Bonta, in his
10 official capacity as Attorney General of
California